3.2 Confidentiality Agreement

Note: General

This provides template clauses that organisations may refer to in relation to their contractual arrangements for data partnership. The template clauses should be adapted to suit organisations’ particular circumstances and needs and incorporated into a complete and effective contract. Use of these clauses does not mean that organisations will be in compliance with any laws or regulations. Organisations should seek professional legal advice on their legal position or obligations or to put in place contractual arrangements, including where using these template clauses.

Note: Confidentiality Agreement

Confidentiality agreements create obligations to preserve the confidentiality and limit the use of confidential information disclosed between parties.

This template can be used where confidential information will be disclosed by both contracting parties for a particular purpose. Where only one party will disclose confidential information, this template can be amended so that confidentiality obligations are only imposed on the receiving party.

A confidentiality agreement cannot provide an absolute guarantee that information will be protected and it should therefore be accompanied by appropriate practical measures. For example, even where a confidentiality agreement is in place, the sharing of confidential information should be on a need-to-know basis and the distribution to individuals should be restricted.

Note: Data Sharing Agreement

If the parties put in place a stand-alone confidentiality agreement and subsequently or concurrently enter into a data sharing agreement, the data sharing agreement should be amended to reflect the extent to which the confidentiality agreement applies to the subject matter of the data sharing agreement.

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Parties

1. [party 1] incorporated and registered in [jurisdiction of incorporation] with company number [number] whose registered office is at [address]
2. [party 2] incorporated and registered in [jurisdiction of incorporation] with company number [number] whose registered office is at [address]

Background

Note: Background

The Background sets out in plain English the background to the Agreement and its purpose, along with the roles of the parties. This Clause serves as an interpretive guide to the remainder of the Agreement and is a good place to set out any unusual features of the Agreement.

The reasons for which the parties will disclose Confidential Information should be set out in this section. For example, the parties may be entering discussions relating to a potential data sharing partnership and seeking to exchange Confidential Information in the course of these discussions. See also notes to Clause 1.1 (Definitions) on the Permitted Purpose.

1. The parties propose to [enter discussions relating to a potential data sharing partnership] which will involve the exchange of Confidential Information (as defined below) between them.
2. The parties have agreed that Confidential Information shared in the course of these activities will only be disclosed and used in accordance with the terms of this Agreement.

It is agreed:

1. Definitions and Interpretation
   1. Definitions

Note: Definitions

Clause 1 sets out meanings for specific terms used in the Agreement as well as provisions necessary for the proper interpretation of the Agreement. Delete any definition not used in the Agreement and consider whether any definitions need to be added.

The Permitted Purpose should be set out in Clause 1.1. The ability for a Recipient (as defined below) to use and disclose that information is restricted by the scope of this purpose. This definition must therefore be carefully drafted to reflect the commercial intention of the parties.

Where parties enter a confidentiality agreement in anticipation of discussions on sharing data with each other, an example Permitted Purpose would be “discussions in relation to a prospective partnership for the sharing of [ ] data”.

|  |  |
| --- | --- |
| Confidential Information | Has the meaning set out in Clause 2. |
| Derived Information | Any information, findings, data or analysis derived wholly or partly from Confidential Information. |
| Disclosing Party | A party or its Representative which directly or indirectly discloses Confidential Information to a Recipient. |
| Permitted Purpose | Means [ ]. |
| Recipient | A party or its Representative which receives Confidential Information from a Disclosing Party, whether directly or indirectly. |
| Representatives | Means in relation to each party:   * + - 1. its partners, directors, officers and employees;       2. its professional advisors or consultants who are engaged to advise the party; and       3. any other person to whom the other party agrees in writing that Confidential Information may be disclosed in connection with the Permitted Purpose. |

* 1. Interpretation

Note: Interpretation

This includes references to schedules, annexes and appendices which are not included in this template. If any such additional elements are included in the Agreement, this structure and taxonomy should be observed.

Item (xiii) below includes the option to cross reference collateral agreements. This is to ensure that where there is any inconsistency between two agreements in respect of the same subject matter, it is clear which agreement prevails. Examples could include pre-existing master or framework agreements, collaboration agreements or memoranda of understanding. Where non-binding agreements, such as non-binding memoranda of understanding are referenced in the Agreement, it may be more appropriate to reference these for information purposes only in the Background.

Clause 12.2 (Entire agreement) should also be updated to reflect the presence and validity of collateral agreements.

(i) Clause, schedule and paragraph headings shall not affect the interpretation of this Agreement; (ii) a person includes a natural person, corporate or unincorporated body (whether or not having separate legal personality); (iii) any schedules form part of this Agreement and shall have effect as if set out in full in the body of this Agreement; (iv) any reference to this Agreement includes the schedules; (v) any reference to a company shall include any company, corporation or other body corporate, wherever and however incorporated or established; (v) unless the context otherwise requires, words in the singular shall include the plural and in the plural shall include the singular; (vi) unless the context otherwise requires, a reference to one gender shall include a reference to the other genders; (vii) a reference to a statute or statutory provision is a reference to it as amended, extended or re-enacted from time to time and shall include all subordinate legislation made from time to time under that statute or statutory provision; (viii) a reference to writing or written includes faxes but not e-mail; (ix) references to clauses and schedules are to the clauses and schedules of this Agreement and references to paragraphs are to paragraphs of the relevant schedule; (x) any words following the terms including, include, in particular or for example or any similar phrase shall be construed as illustrative and shall not limit the generality of the related general words.

In the event and to the extent of any inconsistency between: (xi) any provision contained in the body of this Agreement and any provision contained in the schedules or appendices, the provision in the body of this Agreement shall prevail; (xii) the terms of any accompanying invoice or other documents annexed to this Agreement and any provision contained in the schedules or appendices, the provision contained in the schedules or appendices shall prevail; and (xiii) any of the provisions of this Agreement and the provisions of [ ], the provisions of this Agreement shall prevail.

1. Confidential Information

Note: Confidential Information

The definition of Confidential Information should be drafted to cover all confidential information which the parties wish to protect. An overly broad definition can impose onerous and potentially unenforceable obligations on the parties. It is common for the definition of Confidential Information to include certain carve-outs (see Clause 2.2).

Note that only information which possesses a necessary quality of confidence can be protected as Confidential Information. For this reason, the definition of Confidential Information should be drafted so as to only include information which is, at the outset of disclosure, confidential in nature.

Where the Agreement should cover information shared by the parties prior to the execution of the Agreement, the optional text in Clause 2.1 should be included.

Where certain data is shared, it is possible that the contents of a dataset may be publicly available while the particular compilation or form shared by the Disclosing Party is not. Where this is a possibility and the form of the compilation itself should be protected, the optional wording in Clause 2.2.1 can be included.

* 1. Confidential Information means any information (in writing, electronic form or in any other form or media whatsoever) which is directly or indirectly disclosed by or on behalf of a Disclosing Party to a Recipient [before,] on or after the date of this Agreement and which is confidential in nature, irrespective of whether it is marked as such. This includes:
     1. all confidential commercial, financial, legal and technical information and know-how directly or indirectly related to the business or affairs of the Disclosing Party;
     2. Derived Information;
     3. the existence and contents of any discussions or Agreements between the parties relating to the Permitted Purpose;
     4. the existence and terms of this Agreement; and
     5. any other information that is identified as being of a confidential or proprietary nature,

but excludes any information set out in Clause 2.2.

* 1. Information is not Confidential Information if:
     1. at the time of first disclosure to a Recipient the information was in the public domain [(except that any compilation of data of otherwise public information in a form not in the public domain shall continue to be treated as Confidential Information)];
     2. after disclosure to a Recipient the information comes into the public domain otherwise than by disclosure in breach of the terms of this Agreement;
     3. provided the Recipient can provide supporting documentary evidence, the information was known to the Recipient at the time of first disclosure and was not acquired directly or indirectly from a Disclosing Party;
     4. the Recipient receives the information from a person not connected with the Disclosing Party and that person is not under any obligation of confidence in respect of that information;
     5. the parties agree in writing that the information is not confidential.

1. Confidentiality Obligations

Note: Confidentiality Obligations

This sets out the obligations of each party to preserve the confidentiality of information disclosed and to use the Confidential Information only for the purposes set out in this Agreement.

Additional obligations may be included in this Clause where necessary, such as a requirement that the Recipient impose adequate security measures to protect the data.

Clause 3.2 provides for continuing obligations of confidentiality for a period following termination or expiry of this Agreement. See also Clause 8 (Term and Termination).

* 1. In return for the parties providing each other with Confidential Information, each party undertakes to the other party that it shall:
     1. keep all such Confidential Information disclosed to it strictly confidential;
     2. not disclose or permit the disclosure, publication or communication of any of the Confidential Information disclosed to it to any person except in accordance with the terms of this Agreement;
     3. take all reasonable steps to maintain and preserve the confidential nature and secrecy of the Confidential Information disclosed to it; [and]
     4. not reproduce, use or exploit the Confidential Information except as necessary for the Permitted Purpose; [and]
     5. [other obligations].
  2. The provisions of this Clause 3 shall continue for a period of [five (5)] years following the termination or expiry of this Agreement.

1. Permitted Disclosure

Note: Permitted Disclosure

This allows for the Recipient to disclose Confidential Information to its Representatives in specific circumstances.

Clause 4.1 provides that the Recipient shall only disclose the information to its Representatives where it has ensured that those Representatives will comply with the confidentiality obligations set out in the Agreement. An alternative obligation is the requirement for a direct undertaking from each representative who will receive Confidential Information. This is a more onerous process, however, and may not be necessary unless particularly sensitive information is being shared.

* 1. The Recipient may disclose Confidential Information to its Representatives to the extent that such persons reasonably require access to the Disclosing Party’s Confidential Information in relation to the Permitted Purpose. Disclosure may be made on the basis that the Recipient:
     1. informs the Representatives of the confidential nature of any Confidential information disclosed; and
     2. ensures that those Representatives comply with the confidentiality obligations in Clause 3 as if they were the Recipient.
  2. The Recipient shall be liable for the actions or omissions of its Representatives in relation to the Confidential Information as if they were the actions or omissions of the Recipient.

1. Mandatory Disclosure

Note: Mandatory Disclosure

This recognises that, despite the terms of this Agreement, in some circumstances a party may be required by law, regulation or other order of authority to disclose Confidential Information.

The provision limits the ability to disclose in these circumstances to the extent necessary and requires the Recipient to provide notice to the Disclosing Party of any such disclosures. The particulars on providing notice are set out in Clause 12.4 (Notices).

* 1. A Recipient may disclose any of the Disclosing Party’s Confidential Information as required by the laws or regulations of any country to which its affairs are subject, by order of a court, tribunal, government or regulatory body of competent jurisdiction or by rules of any securities exchange on which it is listed, but only if:
     1. the extent and manner of the disclosure is strictly limited to the demanded disclosure;
     2. where permitted and as soon as is reasonably practicable, the Recipient notifies the Disclosing Party of the demanded disclosure; and
     3. the Recipient provides all reasonable assistance and co-operation to the Disclosing Party to enable the protection of the confidential nature of the Confidential Information which is disclosed.

1. Return of Confidential Information

Note: Return of Confidential Information

This requires the return of Confidential Information at the request of the Disclosing Party. Optional language is included to give the Disclosing Party flexibility to direct that the information instead be destroyed.

Where data is held by a third party, for example on a cloud server, Clause 6.1.3 recognises that an absolute obligation to return or erase such information may not be possible. Instead, this optional provision imposes an obligation that the Recipient take all practicable steps to erase that data.

* 1. Upon the written request of a Disclosing Party, a Recipient must promptly:
     1. return to the Disclosing Party [or destroy if the Disclosing Party so directs] all documents and other materials (whether originals, copies or in electronic form) within the custody, power or control of the Recipient which contain, reflect, incorporate or refer to any of the Disclosing Party’s Confidential Information; [and]
     2. erase all the Disclosing Party’s Confidential Information from its computer and communications systems and devices used by it, or which is stored in electronic form; [and]
     3. [to the extent practicable, erase all the Disclosing Party’s Confidential Information which is stored in electronic form on systems and data storage services provided by third parties.]
  2. Notwithstanding the foregoing, the Recipient shall not be required to return or destroy any documents or materials containing Confidential Information that the Recipient is required to retain under applicable laws or regulations, or that it is required to retain to satisfy the rules or requirements of a regulatory body of competent jurisdiction or securities exchange on which it is listed.
  3. The return, destruction or retention of Confidential Information in accordance with this Clause 6 does not release the parties from their obligations under this Agreement.

1. Reservation of Rights and Acknowledgement

Note: Reservation of Rights and Acknowledgement

This clarifies that each party retains ownership of the Confidential Information which it discloses and that the Disclosing Party makes no representations in respect of the information. Additionally, Clause 7.3 ensures there is no obligation on the parties to further collaborate beyond the exchange of information contemplated by the Agreement.

* 1. Each party reserves all rights in its Confidential Information. In particular, the disclosure of Confidential Information grants no licence or other right to the Recipient in respect of the Confidential Information beyond those expressly set out in this Agreement.
  2. Each party acknowledges that a Disclosing Party and its Representatives make no express or implied representation or warranty as to the accuracy or completeness of its Confidential Information.
  3. The disclosure of Confidential Information by either party shall not form any offer by, or representation or warranty on the part of, that party to enter into any further Agreement with the other party in relation to the Purpose.

1. Term and Termination

Note: Term and Termination

This establishes the duration of the obligations under this Agreement. Parties may set out either a specific number of years or an indefinite period. The potentially onerous ongoing compliance obligations which may come with an indefinite term should be considered by both parties before being implemented.

* 1. This Agreement shall commence on the date of last signature below and shall terminate automatically after the expiry of [five (5)] years.
  2. Either party may terminate this Agreement for convenience upon [thirty (30)] days’ notice in writing to the other.

1. Remedies

Note: Remedies

This acknowledges that the Disclosing Party may seek remedies other than damages for any breach of the Agreement, such as equitable relief or specific performance. Specific performance in the form of an injunction may be a useful remedy where the Disclosing Party learns of the Recipient’s intention to use or disclose the information.

The parties may also wish to seek additional protection in the form of indemnities for losses arising from the misuse or wrongful disclosure of Confidential Information.

Each party acknowledges that damages may be an inadequate remedy for any breach or threatened breach of this Agreement by the other party and that (in addition to any other remedies available at law or in equity) a party may seek and obtain specific performance or injunctive relief in respect of any actual or threatened breach of this Agreement.

1. Governing Law and Jurisdiction

Note: Governing Law and Jurisdiction

This should be determined by the parties in accordance with the laws of the applicable jurisdiction.

The parties may wish to include alternative dispute resolution procedures rather than default to the courts for resolving disputes.

* 1. This Agreement shall be deemed to be made in [the Republic of Singapore], and shall be governed by and construed in accordance with the laws of [the Republic of Singapore]. The parties agree to submit to the exclusive jurisdiction of the courts of [the Republic of Singapore].

1. Warranties

Each party warrants in relation to the Confidential Information that it discloses that it has the right to:

* 1. disclose that Confidential Information to the other party; and
  2. authorise the other party to use that Confidential Information as permitted by this Agreement.

1. General
   1. Assignment
      1. A party is not entitled to assign, transfer, mortgage, charge, sub-contract, declare a trust of or deal in any other manner with any of its rights and obligations under this Agreement without the prior written consent of the other party (which is not to be unreasonably withheld or delayed).
   2. Third party rights
      1. A person who is not a party to this Agreement has no rights, express or implied, to enforce or benefit from any term of this Agreement.
   3. Entire agreement
      1. This Agreement constitutes the entire agreement between the parties and supersedes all previous discussions, correspondence, negotiations, arrangements, understandings and agreements between them relating to its subject matter.
      2. Each party acknowledges that in entering into this Agreement it does not rely on, and shall have no remedies in respect of, any representation or warranty (whether made innocently or negligently) that is not set out in this Agreement.
      3. Each party agrees that it shall have no claim for innocent or negligent misrepresentation or negligent misstatement based on any statement in this Agreement.
   4. Notices
      1. Any notice, consent, waiver or other communication given under this Agreement must be in writing and may be delivered by hand or sent by pre-paid first class post or other next working day delivery service to the address of the other party specified at the beginning of this Agreement, or any other address notified from time to time by the parties.
   5. Variation
      1. No amendment, variation or waiver of this Agreement shall be valid unless in writing and duly executed by or on behalf of all the parties.
   6. No Waiver
      1. No failure or delay by a party to exercise any right or remedy provided under this Agreement or by law shall constitute a waiver of that or any other right or remedy, nor shall it preclude or restrict the further exercise of that or any other right or remedy. No single or partial exercise of any right or remedy shall preclude or restrict the further exercise of that or any other right or remedy.
   7. Severability
      1. Each of the provisions of this Agreement is severable. If any provision or part-provision of this Agreement is found by any court or other authority of competent jurisdiction to be invalid, illegal or unenforceable, the parties shall negotiate in good faith a suitable replacement provision, which, to the greatest extent possible, achieves the parties’ original commercial intentions.
2. Signatures

Note: Signatures

The signature block and particulars will be dependent on the type of corporate entity signing this Agreement, as well as the jurisdiction in which the data partners are based.